No. 147.

Brief of McGowan for Pltf. in Error.

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Supreme Court of the United States.

October Term, 1900.

Filed Dec. 20, 1900.

HENRY LOCKHART,
Plaintiff in Error,

v.

J. A. JOHNSON, JULIA A. JOHNSON, CHARLES PILKEY, et als.,
Defendants in Error.

No. 147.

Statement and Brief for Plaintiff in Error.

J. R. McGOWAN,
Attorney for Plaintiff in Error.

WASHINGTON, D. C.
Gibson Bros., Printers and Bookbinders.
1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

HENRY LOCKHART,
PLAINTIFF IN ERROR,

v.

J. A. JOHNSON, JULIA A. JOHNSON, CHARLES PILKEY, ET ALS.,
DEFENDANTS IN ERROR.

No. 147.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

This is a case in ejectment to secure possession of a tract of land first known as the "Sampson" lode or mining claim, afterwards as the "Washington" claim. The premises are situated in Bernalilo county, New Mexico. The suit was commenced in the district court for that county, was tried before a jury which, at the close of the hearing, was ordered to return a verdict for the defendants. It was then taken to the Supreme Court of the Territory on writ of error, which court unanimously reversed the judgment below and remanded the case for a new trial. *Record*, 266. This judgment of the Territorial Supreme Court was rendered October 2, 1897. The defendants in error entered a motion for rehearing which was not considered until a change of Federal administration had resulted in a complete change in the personnel of the court, when the motion for rehearing was allowed

and the case again heard, the former decision reversed, and the decision of the trial court affirmed. From this latter decision the case is brought here on error.

The record discloses the following facts necessary to a proper understanding of the case: "The plaintiff, with one Ben Johnson and Charles Pilkey, one of the defendants, on the 7th of May, 1893, entered into a contract in writing, under seal, whereby Pilkey agreed to 'prospect and *locate* such veins or lodes and placers as he may discover or know the existence of, containing valuable ores or minerals, in the name and for the joint benefit of all the parties' thereto, in the proportion of one-third interest to said Pilkey, and an undivided two-thirds interest to plaintiff and Johnson. The plaintiff and Johnson were to furnish Pilkey with certain articles and tools—set out in the contract—and agreed that when he had sunken a shaft or tunnel of a certain size in a vein of mineral-bearing quartz, to a depth of twenty feet, such vein to be designated by plaintiff and Johnson, they would pay him thirty dollars in money in addition to the articles and tools mentioned. The agreement was to continue in force for one year, and all discoveries or locations made by Pilkey during that time were to be covered by its terms. Pilkey was directly bound not 'to create any debt or make any contract binding the second parties to this agreement unless authorized to do so in writing by the said second parties.' It was also provided that 'any concealment of a discovery or failure to locate a valuable mineral claim or claims for the purpose of evading the terms of this agreement and defrauding the said second parties shall work a forfeiture of any right or interest, direct or indirect, that such first party might have or afterwards obtain, to and for the benefit of the said second parties." *Record*, 13.

During the life of this contract, and in pursuance of its terms and obligations, Pilkey discovered and took possession of the premises in dispute, being a tract of land 600 feet wide

and 1,500 feet long, afterwards named by the parties to the contract, the "Sampson Mine," and which later came to be known as the "Washington Mine." The location was made by Pilkey and possession taken by him on the 10th of July, 1893, for the joint benefit of the three parties to the agreement. *Record*, 21. This was about two months after the date of the contract. *Record*, 280; *2d Finding*. The location was made and the possession indicated by posting a notice in a conspicuous place upon said claim, containing a description of the grounds, and signed by the names of the three parties to the agreement. This fact is established by the testimony offered by both parties to the suit, as set out in the testimony and found in the first opinion of the Supreme Court. *Record*, 268. The evidence in the record also discloses that plaintiff and Johnson complied with their part of the contract.

Further facts, deemed important, are set out in a stipulation between the parties to the suit, found on pages 31 and 32 of the record, and made the first finding of the court. *Record* 279. This stipulation is as follows:

STIPULATION.

"It is stipulated and agreed by and between the plaintiff and defendants in above-entitled cause that the premises in controversy in this case are situated within the limits of private land claim reported as number 135 in the office of the surveyor-general of the Territory of New Mexico, known as the Canada de Cochita tract, as said claim was surveyed by the surveyor-general, said survey having been made and approved by Clarence Pullen, Surveyor-General, on the date of June 29, A. D. 1885.

It is further stipulated that said private land claim was never confirmed upon report of the surveyor-general, but two petitions for the confirmation of the same were filed in the court of private land claims, one by Joel

Parker Whitney, Jose Juan Lucero, Lauriano Lucero, Juan Cristoval Lucero, Jose de Jesus Lucero, Juan Teodora Lucero, Jose Telesfor Lucero, Bernard S. Rodney, and Hannah Harris, being numbered 205 on the docket of the court of private land claims at Santa Fé, and filed March 2, 1893; and the other petition being filed by Manuel Hurtado and Jose Antonio Gallego on the 3d day of March, 1893, and that said petitions were consolidated in said cases heard and decree of confirmation rendered by said court on the 29th day of September, A. D. 1894, a compared copy of which decree is attached to this stipulation.

It is further stipulated and agreed that the said premises in controversy in this case are not included within the boundaries of said grant as confirmed by said decree.

It is further stipulated and agreed that an appeal was taken from said decree by all of the said petitioners to the Supreme Court of the United States, in which court said cause is now pending upon said appeal and undetermined, said appeal being dated the 11th day of March, A. D. 1895.

It is further stipulated and agreed that the official printed copies of the reports of the surveyor-general to Congress upon said private land claim, and all documents attached thereto, may be used upon the trial of this cause to the same effect as if they were the original documents and archives on file in the surveyor-general's office, subject, however, to such objection as the parties may make upon other grounds."

WARREN, FERGUSSON & GILLETT,
Plaintiff's Attorneys.

CHILDERS & DOBSON,
W. C. HEACOCK,
For Defendants.

Before the commencement of the suit, the property had passed by judicial decree into the hands of Charles Bonsall as receiver, who was made one of the defendants by leave of the court.

An ordinary declaration in ejectment was filed and the defendants plead not guilty, and demanded a jury trial.

Upon the trial of the case, as appears by the record, the plaintiff made frequent offers to prove the alleged conspiracy between Pilkey, Walker, and Fagaly to defraud him out of his possession. The statements of these defendants, against interest, made to various parties, were offered in proof, also their acts in carrying out the conspiracy. Several witnesses were sworn and examined before the court, in the absence of the jury, whose testimony disclosed substantially the following: That about the time Pilkey entered into the contract with the plaintiff and Johnson, and before he started to make the explorations required of him by such contract, he arranged with Levy Walker (also known as Lee Walker) and Frank Fagaly, two notorious gamblers, whereby he was to notify them when he found valuable ore, and between them they were to cheat and defraud Lockhart and Johnson out of the benefits of the contract; that in pursuance of this arrangement, when Pilkey found valuable ore on the premises, known at that time as the "Sampson," he communicated the fact to Fagaly, who had some of the ore assayed, the assay indicating that it ran in gold and silver as high as $2,600 to the ton; and thereupon Fagaly went to the premises, a place difficult of access, located some 75 miles from Albuquerque, where all the parties lived, and he and Pilkey carried out the conspiracy so far as they could by Pilkey omitting to do any further work on the claim by setting up other boundaries, sinking shaft to proper depth, &c., as bound to do under his contract with Lockhart and Johnson, and as definitely directed to do by Lockhart, and by occupying the premises to the exclusion of the right of occupancy of Lockhart and Johnson, subsequently removing and destroying the notice that had been placed on the premises in the name of Lockhart, Johnson, and Pilkey, by which said notice the premises were named the "Sampson," and substituting a notice signed by F. Fagaly, Lee (Levy) Walker, H. C. Leeds, and J. Johnson, wherein the premises were

named the "Washington." It being in evidence that plaintiff and Ben Johnson and Pilkey took possession of the premises and placed their said notice thereon on the 10th day of July, 1893, it was further disclosed by the offered testimony—and other proofs tendered—that Fagaly and Pilkey entered upon the same on behalf of themselves and their co-conspirator, or co-conspirators, as early as the following September, and continued to occupy thereafter to the exclusion of the plaintiff and said Ben Johnson, and that for the purposes of covering up the fraud, the name of Pilkey was omitted from the notice subsequently placed on the premises by the defendants, and omitted from any other papers relating to the claim—but that two shares were put into the name of Lee Walker, one of which he was to hold in trust for Pilkey. On this point, and relating to statements and confessions made by Fagaly, one witness—H. B. Fergusson—testified before the court, in the absence of the jury, as follows:

> "Q. Now you will please state what, if anything, he said as to a prearrangement between himself, Walker, and Pilkey, with reference to the possession of the ground in controversy in this suit, originally called the Sampson, and subsequently, by these defendants, called the Washington.
>
> A. When I first asked him to tell me all the facts in the matter, as above stated, he said, 'I do not like to do it, if I were a mind to,' and I am giving his exact words now—'I do not like to do that' as near as I can recollect—'If I were a mind to I could knock them out of the Washington claim entirely.'
>
> Counsel for defendant: That is, Fagaly said that?
>
> A. Yes, sir. He had previously expressed his hostility to Wills, Johnson, and Leeds, saying, in effect, he had taken all of them into the Washington; that they were now trying to rob him of a part of his interest. After saying: 'If I were a mind to I could knock them out of the Washington claim entirely,' or words to that effect—that is as near as I can recall the exact words—

he added, 'I don't like to tell this thing, because, if I am a gambler'—he used exactly these words—'I have a good reputation in this town.' I then told him I thought it was his duty to tell me after saying that much to me, but he went away that day, saying he wanted to think about it more. Subsequently he came up and told me he was ready to tell me all he knew about it, and would take the stand and testify, and, in direct answer to the last question, he said that Walker came to him, certainly not earlier than September. He first said in the latter part of the summer of 1893. When I pressed him to fix the month, he said it might have been in August, but certainly was in September that Walker came to him in Albuquerque, Levy Walker, or Lee Walker, as he is indiscriminately called, and told him that Pilkey had something good in the Cochiti mountains; that Pilkey and he had long been friends—that is, that Walker said to Fagaly, as Fagaly reported it to me—that he, Walker, and Pilkey had long been friends, and Pilkey, in prospecting for Lockhart and Ben. Johnson, had found some valuable claims, and that Pilkey was willing to fix one of them, which he thought was the best, so that they could get it, or words to that effect; that he, Pilkey, wanted him, Walker, to go up with him and see what he had; that Walker said to him, Fagaly, after stating this, that he was not in good health and could not stand the fatigue or hardship, and that he believed Pilkey would be willing to take Fagaly in with him, provided he, Fagaly, would go and see about it, see what he had, whether it was worth fooling with, with a view of acquiring it. Fagaly said he then went up in the same month of September, early in September, inspected the claims, and, especially what was known as the Sampson, being the one that Walker had referred to, as I understood, as being what Pilkey considered the best. I would like to state that these disclosures were in response to questions from me, myself; that he found the claim with a notice posted on it and some work done; that he examined the lead and took a piece of rock selected by himself and Pilkey; brought it back to Albuquerque with him; had it assayed

and got an assay of a little more—I do not remember the exact dollars, but I do remember it was a little in excess, as he reported to me, of $2,600 a ton. He said he immediately stirred around lively after getting that assay and took in—I do not remember whether he said he took them in then or not; that after getting the assay he made arrangements to go up and locate the claim. He told me that he made two trips to this mining claim, the Sampson, before the date that it would expire, which was the 10th of October, 1893. The first one was a brief visit to get this ore; the next one he went up with Pilkey about the first of October, or soon after the first of October, and went on the claim again with Pilkey and remained in Pilkey's camp until the 10th of October had expired, and that from the 10th of October until the 23d of October Pilkey was paid $2.00 a day by the partnership or parties who were to locate this ground to take care of the claim for them.

Q. From what time?

A. From the 10th.

Court: To the 23d?

A. Yes, sir; until the Washington was located; that he, Fagaly, spent part of that time in the village of Cochiti waiting for the time to expire, and he told me it was not located as soon as the day of October 10th passed because it would excite suspicion if it was located too soon afterwards; that the arrangement was made with Pilkey before the 10th of October, 1893, by which the claim was to be located in the name of four people, and that the ownership was to be one-fifth to H. C. Leeds, as he stated, one-fifth to J. Johnson, one-fifth to himself, Fagaly, the other two-fifths were to stand in Levy Walker's name, but one-fifth was to belong to Pilkey; that Pilkey agreed, in consideration of having one-fifth of not being called upon for development expenses for his share, and of this pay as laborer on claim at $2.00 a day, to allow the time within which the work on the Sampson claim was to be done, within which it was to be staked, and the notice to be recorded, to expire without doing it. This he told me in substance and effect in various conversations."

See Record, pp. 111 and 112.

There was other testimony to the same effect given before the court in the absence of the jury, part of it disclosing the agreement between Pilkey, Fagaly and Walker—which was made before Pilkey started out to fulfill his contract with the plaintiff and Ben. Johnson. For instance, Mrs. Stella A. Metz, a woman who kept a boarding-house in Albuquerque where Lee Walker boarded, testified on pages 135 and 136 of the record:

"Q. Please state what was said by Pilkey, Walker and Fagaly to you prior to the first of October, 1893, in reference to the possession of the property known as the Sampson mine?

A. Well, my statements would go back to April of 1893 before the locations were ever made in regard to this matter, what I knew of it.

Q. By anybody?

A. By Levy Walker and Charles Pilkey.

Q. Statements made between June 10, 1893, and the 1st of October, 1893; just state what was said by them in reference to the possession, if anything, of this property.

A. Well, I don't see how I could state it unless I begin at the beginning before the locations were made.

Q. Well, it is not necessary to go back beyond the time I have indicated.

A. Well, Mr. Pilkey and Mr. Walker entered into an agreement; he was going prospecting for Mr. Lockhart and Mr. Johnson, and that he was to retain—if he would provide for a woman in old town, he would retain and protect the best location made for them; when the time expired he could either relocate it or have someone else relocate it, and give him a silent interest in it, him, Pilkey, a silent interest in it, the best location, that he reserved for them, Pilkey and Walker.

Q. Where were these conversations?

A. In my house and at my table at different times.

Q. When did you first hear of the Sampson mine from them?

A. The latter part of June or the first part of July; I am not positive which.

Q. 1893?

A. Yes, sir.

Q. State what was said in reference to the possession of that mine at that time?

A. Well—whom it was in possession of?

Q. Yes.

A. The supposition was it belonged——

Q. Just state what they said.

A. That he had made these locations for Henry Lockhart and Ben. Johnson and himself.

Q. What locations?

A. The Sampson and the Columbus are the only two names I remember; there were other locations made I think but I do not remember the names.

Q. Who took part in these conversations when the Sampson was first alluded to?

A. No one but Mr. Walker and Mr. Pilkey.

Q. What if anything did Pilkey state with reference to having made the Sampson location for Johnson and Lockhart?

A. He made this location as he said he thought it was the best one and he would let the time run out, and as I told you he said they would relocate it; he would let the time run out; Walker could relocate it or send some one to relocate it and give him a silent interest in this mine now known as the Washington.

Q. Was Fagaly present?

A. Not at that time.

Q. At any time were they three present before the 1st of October, 1893?

A. Yes, sir; in September.

Q. What time in September, about?

A. Between the 5th and 10th, but the day I do not remember.

Q. What, if anything, was said by Pilkey or either of the other two in reference to who then had possession of the Sampson mine?

A. Pilkey was guarding it for Mr. Walker, but the time hadn't—it was then too early to relocate it."

See Record 135 and 136.

All this testimony and testimony of this character the court refused to allow to go to the jury.

Eventually the counsel for the plaintiff made the following offer in writing, to which objection was made and objection sustained, and exception entered: *Record*, 248–9.

> "The following statement in writing is submitted to the court and made a part of this record, in connection with the witness Neeland's testimony while on the stand by counsel for plaintiff, which testimony proposed to be offered is objected to by counsel for defendants, which objection is sustained by the court, and to which ruling of the court counsel for plaintiff excepts.
>
> In connection with the witness, John S. Neeland, now on the stand, we reoffer his testimony as taken before the court upon the case in chief of the plaintiff, and then ruled out; that evidence as taken by the stenographer is offered now in rebuttal; and we also offer the testimony of Mrs. Stella A. Metz, George Blake, B. J. Lohman, and Mrs. Ellen L. Lockhart, offering to prove by the said witnesses statements made at different times and places to the said witnesses by Frank Fagaly, Levy Walker, who are now dead, as well as statements of Charles Pilkey, who is now a defendant in this case, which statements of the said three parties, two of whom are now dead, were made prior to October 10, 1893; and the said statements were and are to the following effect:
>
> That in September, 1893, ore was sent from the Sampson mine by Pilkey, who was then in charge of the Sampson mine for Henry Lockhart and Ben. Johnson, to Levy Walker, which the said Walker had assayed; that thereupon soon afterwards the said Pilkey being in Albuquerque, and about the middle of September the said Walker and Pilkey agreed to take Frank Fagaly into the scheme to obtain possession of the said Sampson mine and oust the said Henry Lockhart and Ben. Johnson therefrom; that it was then arranged by the three parties named, in the presence of some one or more of the above-named witnesses, that the said Fagaly should accompany the said Pilkey to the Sampson mine for the first time in the

month of September, 1893, and did go into possession with the said Pilkey of the said mine in pursuance of the arrangement and conspiracy aforesaid, did exercise acts of ownership and possession and take samples of ore from said vein, with which he returned to Albuquerque; that thereupon assays were had of the said ore so brought by said Fagaly to Walker, and that soon after the return of said assay, which was about $2,600 to the ton, the said Pilkey came to Albuquerque October 2 or 3, 1893, and that it was then arranged, that in view of the large assay it was necessary to speedily get back upon the said Sampson claim, inasmuch as ninety days would elapse from its location on October 10th, and that on or about the 6th or 7th of October the said Fagaly and the said Pilkey actually left Albuquerque with the expressed intention of taking actual possession of the said Sampson mine, and did so actually, prior to October 10, 1893, resume the possession and so take the possession which had been begun when Fagaly first visited said mine in September, and from that taking of actual foot possession prior to October 10, 1893, they actually so held possession and have continually held it since."

In the Supreme Court of the Territory the plaintiff assigned the following errors: *Record*, 263–4.

ASSIGNMENT OF ERRORS.

Now comes Henry Lockhart, the plaintiff in error in the above entitled cause, and assigns the following errors appearing in the record herein, viz:

1. The court erred in admitting improper and incompetent evidence against the objection of plaintiff below.
2. The court erred in excluding material, competent, and proper evidence offered by the plaintiff below.
3. The court erred in instructing the jury to find a verdict for the defendants below.
4. The court erred in refusing to submit the issues of fact in said cause to the jury.

5. The court erred in determining the issue of alleged abandonment of the premises by plaintiff below as a question of law when the same was a question of fact, and in determining the same against the plaintiff below upon the evidence, and in refusing to submit the same to the jury.

6. The court erred in denying the motion of plaintiff below for a new trial of said cause.

7. The plaintiff below was denied a fair and impartial trial. Wherefore, and for divers other errors appearing in said record, the plaintiff in error prays that the judgment below in said cause be in all things reversed and set aside, and that such further proceedings be had therein as may be agreeable to law.

After the final judgment in the Supreme Court of the Territory the plaintiff filed the following motion for a rehearing which motion was disallowed: *Record*, 275–6.

MOTION OF PLAINTIFF IN ERROR FOR REHEARING.

The plaintiff in error, by Warren and Fergusson, his attorneys, prays the court for a rehearing in the above-entitled cause, and respectfully shows into the court the following grounds for this petition, viz:

I.

This court decides, in the opinion filed herein, that, "there being no reservation of these lands within claimed grants in New Mexico, by treaty, law or authorized act of the executive department of the Government, we conclude that they are not reserved lands, and are 'lands belonging to the United States,' within the meaning of section 2319 of the Revised Statutes of the United States," and that the failure of the plaintiff to comply with the mining laws and regulations applicable to "lands belonging to the United States" worked a forfeiture of plaintiff's possessory rights.

Plaintiff submits that this court was not authorized to enter final judgment in favor of defendants, because the question of law so decided was not raised, presented or decided upon the trial in the court below, under the stipulation of the parties signed, filed and made part of the record in said cause; the court failed to take into consideration the controlling requirement of our statute.

Section 3141, C. L. N. M., of 1897.

II.

The court in overruling or disregarding the various orders and decisions of the Interior Department referred to, and particularly the order of the Commissioner of the General Land Office, made May 27, 1897, in reference to the reservation of this Canada de Cochiti grant, within the claimed boundaries of which the *locus in quo* is admittedly situated, failed to take into consideration that the Commissioner in directing the reservation of said grant, was acting within the scope of his legal executive powers, and that his action, prior to final completion of the duties imposed by law upon the Interior Department, being executive and not judicial in character, was not assailable in the courts.

Sec. 2478, Rev. Stat. of U. S.
Sec. 9, p. 520, Supp. Stat. of U. S.
Art. 8, Treaty with Mexico, C. L. of 1897, p. 31.
Kendall *v.* San Juan Silver M. Co., 144 U. S. 664.

III.

This court, in entering a final judgment for defendant, failed to take into consideration that upon a new trial the plaintiff would have the opportunity and occasion to introduce evidence showing that the entry made by defendant upon plaintiff's possession under color of the mining laws, was in fact initiated by fraud and maintained by force, which was denied him upon the trial below, as is shown by the record.

IV.

The plaintiff in error neglected to call the attention of the court to controlling authority upon the questions of law involved, and the court failed to consider the same, in connection with the facts shown by the record.

The following findings were also made and certified by the Supreme Court: *Record*, 279, 280.

IN THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.
JULY TERM, A. D. 1898.

HENRY LOCKHART, Plaintiff in Error, *v.* THE WASHINGTON GOLD & SILVER MINING COMPANY *et al.*, Defendants in Error.	No. 716. Error to District Court, Bernalilo County.

Henry Lockhart, the plaintiff in error in the above-entitled cause, having prayed an appeal from the judgment and decision of this court, heretofore and during the July, A. D. 1898, term thereof rendered and made in this cause, and said appeal having been allowed, and said plaintiff having also prayed that this court make and certify, in accordance with law and the rules of the Supreme Court of the United States, a finding and statement of facts in this cause to be transmitted and used on such appeal, this court does hereby make and certify the following statement of facts in the nature of a special verdict herein, at the request of said plaintiff in error as follows:

1. At the trial of this cause in the district court, the parties stipulated and agreed with each other as follows: "It is stipulated and agreed by and between the plaintiff and defendants in the above-entitled cause that the premises in controversy in this case are situated within the limits of private land claim reported as number 135 in the office of the surveyor general for the Territory of New

Mexico, known as the Canada de Cochiti tract, as said claim was surveyed by the surveyor general, said survey having been made and approved by Clarence Pullen, surveyor general, on the date of June 29, A. D. 1885.

"It is further stipulated that said private land claim was never confirmed upon report of the surveyor general, but two petitions for the confirmation of the same *was* filed in the court of private land claims, one by Joel Parker Whitney, Jose Juan Lucero, Lauriano Lucero, Juan Cristoval Lucero, Jose de Jesus Lucero, Juan Teodora Lucero, Jose Telesforo Lucero, Bernard S. Rodney, and Hannah Harris, being numbered 205 on the docket of the court of private land claims, at Santa Fé, and filed March 2, 1893, and the other petition being filed by Manuel Urtado and Jose Antonio Gallego, on the 3d day of March, 1893, and that said petitions were consolidated and said causes heard and decree of confirmation rendered by said court on the 29th day of September, A. D. 1894. * * *

"It is further stipulated and agreed that the said premises in controversy in this case are not included within the boundaries of said grant as confirmed in said decree."

"It is further stipulated and agreed that an appeal was taken from said decree by all of the said petitioners to the Supreme Court of the United States, in which court said cause is now pending upon said appeal and undetermined, said appeal being dated the 11th day of March, A. D. 1895."

Now, this court doth find the facts as stated in said stipulations to be true.

And now this court, at the request of the said defendants in error, makes the following findings of fact from the evidence in said cause:

2. The plaintiff in error, Henry Lockhart, one Benjamin Johnson, and one Charles Pilkey, on the 10th day of July, A. D. 1893, attempted to locate the mining claim*ed* called the "Sampson," which includes the ground in controversy in this cause.

3. These locators did not know that the ground in question was included in any private claim until the

winter or spring following this location, but believed it was on unoccupied public domain.

4. No location notice was filed for record for said Sampson location until December 9, 1893, and it was then recorded by the plaintiff in error, Henry Lockhart.

5. The evidence fails to satisfactorily show that monuments were placed on the ground by plaintiff in error on the Sampson location within ninety days from the 10th day of July, 1893.

6. The evidence does not satisfactorily show that a discovery shaft upon said claim, to the depth of ten feet, from the lowest part of the rim of such shaft at the surface, or that a tunnel, open cut, or adit was driven upon said claim, exposing mineral in place, within ninety days from July 10, 1893.

7. On the 23d day of October, 1893, the defendants in error went peaceably into possession of the ground in controversy and proceeded to make a location, known as the "Washington," and continued in the uninterrupted possession thereof until this suit was brought, and, so far as the evidence shows, are still in possession thereof.

Done at Las Cruces, New Mexico, February 9, A. D. 1899.

FRANK W. PARKER,
Associate Justice of the Supreme Court of the Territory of New Mexico.

Plaintiff in error offers to note following exception, which is denied:

"To the finding and statement of which said facts, at the request of the defendants in error, the plaintiff in error at the time excepted and now excepts."

WILLIAM J. MILLS,
Chief Justice, &c.

ARGUMENT.

The plaintiff's assignments of error on which the case was tried in the Supreme Court of the Territory (Rec. 263–4), his motion for rehearing and the points made thereunder (Rec. 275–6), and the findings of fact (Rec. 279–80), bring the case before this court under the laws and rules relating to appeals from supreme courts of Territories. San Pedro, &c., Co. *v.* U. S., 146 U. S. 120–36; 911, and Zeckendorf *v.* Johnson, 123 U. S. 617–31; 277. We also conceive that the court may properly pass upon the alleged errors in the admission and rejection of proffered evidence, as this does not require an examination of the *weight* of the evidence and does not involve any disregard of the facts as found. Young *v.* Amy, 171 U. S. 179–43; 127. The findings make no reference to the fact that plaintiff offered to prove that the defendants secured the possession from him by fraud, and that the trial court ruled out proofs tending to establish this fact. Neither do they show that the court took the case from the jury and thus determined itself the alleged fact of abandonment. Hence this court, under Young *v.* Amy *supra*, may pass upon these questions found in the record and raised by the assignment of errors.

Upon the trial of the case the plaintiff depended on the following contentions:

1. That the premises were located within the claimed boundaries of the Spanish grant known as the Canada de Cochiti, which was then in a state of reservation and the title to which was then in litigation, and that said grant was not such "public lands of the United States" as were subject to the mining laws of the United States or those of the Territory, and hence plaintiff was not required to put up monuments, sink shaft, &c., within three months—or any other time—in order to maintain his possession.

2. That while the plaintiff was properly and peaceably in possession he was wrongfully ousted by the defendants as the result of a conspiracy and fraud.

I.

Was the tract in question upon lands subject to mineral location?

The stipulation between the parties (Rec. 31), which forms the first finding of the court, discloses the following facts:

1. That the premises were within the claimed boundaries of a Spanish grant that had been duly surveyed by the surveyor general of the Territory and reported to Congress in pursuance of the requirements of the act of July 22, 1854 (10 St. 308); and, 2, that at the time the plaintiff went into possession and when this suit was begun the whole question of the title to said grant was *sub judice*. Upon these facts we contended and contend that the land was in a state of reservation and was not "lands belonging to the United States," within the meaning of section 2319 of the Revised Statutes of the United States, which determines the character of lands open to exploration for mining purposes.

The grant having been surveyed and reported to Congress under section 8 of the act of 1854 *supra*, all the lands within the boundaries were at once reserved by the terms of the act itself. The act provides that when the report is made according to prescribed form it "shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of 1848 between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."

This settles conclusively the question of the reservation of the Canada de Cochiti grant at the times mentioned, unless such reservation had been subsequently legally cancelled. The court below, in arguing this question in its opinion (Rec.

283, *et seq.*), alleges, in substance, that section 15 of the act of March 3, 1891 (26 St. 854), by repealing section 8 of the act of 1854, terminated the reservation. But the repealing section does not, either by express words or necessary implication, undertake to terminate reservation of claimed grants then existing.

The act of 1891 simply established another scheme for settling the questions relating to titles of private land grants. The then existing scheme was found in section 8 of the act of 1854. It was therefore necessary to repeal that section. After 1891 no more such grants would be reported to Congress, and hence there would be no further legislative reservations of the character made therefrom. But this repeal did not destroy the reservations existing. It would have been unjust to have done so. It would have violated the national obligations found in the treaty of Guadalupe Hidalgo. By articles VIII and IX of said treaty the private property within the ceded territory belonging to resident or non-resident Mexicans was to be fully protected. And in a protocol to said treaty it is declared, in relation to private grants, made by Mexico in the ceded territories, that the true intent is to "preserve the legal value they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals." Without any legislation on the part of Congress this would have been sufficient to have preserved the grants from any appropriation by others until the "American tribunals" had fixed the quality and extent of the titles by decree. Any proper tribunal would have so held. It was only to add to this assurance of reservation, and to give positive notice to the executive departments that the treaty provisions were to be respected both in letter and spirit, that any legislation on the subject was needed. And from this point of view it would not have changed the rights of the private grant claimants even if the legislative reservations had been cancelled. The treaty reservations would have stood and been

sufficient to have kept the grants severed from the "public domain" until the grantee's rights had been finally decreed.

The land department has always taken the view which we here urge. Subsequent to the act of 1891 Secretary Smith discussed and decided this very question, with others, in Tumacacori and Calabayas Grant, 16 L. D. 408. This decision was rendered in May, 1893, and I cannot do better than to bring to the attention of the court some portions of it bearing on this question of the reservation of the Spanish and Mexican grants within our territories. The Secretary says:

> "It has been shown that in pursuance of the national obligation to protect property rights, in the newly ceded territory, Congress passed the act of 1854 *supra*, as to the land within the then boundaries of New Mexico, which were enlarged, a few days thereafter, so as to include the Gadsden purchase. By section 8 of the recited act and regulations thereunder, parties claiming land grants within said territory were to make claim therefor before the surveyor general, and present to him their evidence on that behalf. That officer was to ascertain 'the origin, nature, character and extent of all claims' thus submitted, under the rules prescribed, and make full report on all such 'claims' to Congress for its action; and until the final action of that tribunal 'on such claims, all lands covered thereby shall be reserved,'" etc.
>
> This language, to my apprehension, is perfectly plain, its meaning clear beyond controversy, leaving no room for discussion which would fail to enlighten.
>
> The legislation of Congress in relation to grants in the territory acquired from New Mexico was somewhat different from its legislation as to grants within previously acquired territory. In regard to the Mexican grants, whilst intending to fully protect private property interests it was not proposed to recognize those grants as complete, but rather as inchoate, and needing further confirmatory action on the part of the Government. The purpose of this legislation was not to evade any national obligations or to meet them in a narrow or illiberal manner

and with a view of enforcing forfeiture, but to discharge them in a broad and liberal spirit as becomes a great nation desiring to afford protection to just rights, by giving the parties who possess them an opportunity to make a record thereof in this country in such a manner as will prevent future controversy, and put the land titles of those communities upon a stable foundation. Fremont *v.* United States, 17 How. 542, 553; Botiller *v.* Domingues, 130 U S. 238–247.

None of the titles being recognized, before adjudication, as complete, they were held to be mere "claims" for land asserted to have been granted while the country was under the dominion of a former government. To carry out, in good faith, our obligations, it was of the utmost importance that the land covered by such "claims" should be held intact for the benefit of the claimants, if successful in the assertion of right thereto. This could only be done effectually by severing those lands from the public domain and placing them in reservation. Of so much importance did Congress deem this reservation that it was not content to leave the matter to the discretion of those charged with the administration of the land laws, whose power, if exercised, was ample to make a reservation; but it unequivocally and in the most positive manner declared that all lands covered by such claims "shall be reserved." This mandate is peremptory, without qualification, and emanates from the highest authority known to the law. The act does not say that the Secretary may in his discretion reserve the claimed lands, or if the Commissioner be satisfied the claim is legal or *bona fide*, or that the proceedings before the surveyor general be regular, then the Commissioner may reserve them or not. * * *

By act of March 3, 1853 (10 Stat. 244), the public lands in California, with certain exceptions, were thrown open to settlement and entry. Among the exceptions were "lands claimed under any foreign grant or title." In the case of Newhall *v.* Sanger (92 U. S., 761), the question came before the Supreme Court as to whether the provision of the last cited act would reserve the land within the claimed limits of a fraudulent grant. The court said, page 765:

"This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed, but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication."

It is thus seen that the validity or invalidity of the claim can in no respect affect the question of the reservation, where claim is made and investigation is pending. In fact, the invalidity cannot be ascertained until after adjudication, whilst the reservation was intended to be an actual subsisting prohibition against intrusion upon the claimed lands, until an opportunity was afforded the parties for a judicial hearing and investigation. Necessarily, then, to effectuate fully its purpose, this prohibition was intended to operate as soon as "claim" was made to a particular tract of land before the surveyor general, for it was as important to protect it from intruders during his investigation as that of Congress.

I have therefore no difficulty in deciding that this is a case of statutory reservation, which operated *propio vigore* upon the land claimed as soon as claim therefor was made before the surveyor general, and withheld the same from other appropriation until disposed of by direction of Congress; and that it is not in the power of the executive to change, modify, or revoke the restoration thus made. * * *

The act of 1854 created a statutory withdrawal, which attached instantly to land claimed before the surveyor general, and was co-extensive with that claim; nothing that the land officers may do can in any way affect the validity, the extent or effectiveness of said withdrawal, which being established by Congress is subject to its action alone. What the Commissioner or surveyor general might do in the way of defining the extent of the reservation, whilst effective, perhaps, as notice to the public at large, could in no way add to or take from the force and effect of the reservation made by Congress, or prejudice the rights of the claimants.

It is not seen that the act of March 3, 1891 (26 Stat.

854), establishing a court for the settlement of private land claims, has any particular bearing upon the matters herein discussed. As shown, the act of 1854 provided that upon the institution of proceedings before the sur veyor general, the claimed lands should be reserved until the final action of Congress. The act of 1891 repeals that portion of the act of 1854 referred to, and hereafter there will be no such proceedings before the surveyor general and no coincident statutory reservation, But the repealing act does not, either by expression or necessary implication, revoke or annul the statutory reservations in force at the time of its passage. In my opinion, every legal intendment is that said reservations should remain in full effect until the claims they protect are disposed of in accordance with the provisions of the new act."

The principles thus laid down by the Secretary to guide the Department, were announced in connection with the consideration of a grant located in Arizona and in the Gadsden purchase. Two years later the Commissioner of the General Land Office had under consideration the Canada de Cochiti grant, which is involved in our contention here, and discussed the question of reservation in a letter to the surveyor general of New Mexco under date of January 17, 1895. This was after the decision of the Court of Private Land Claims, and about 60 days before the case had been appealed to this court. Among other things the Commissioner says:

"The only question before me, however, is that of the reservation of the tract originally claimed, until the Court of Private Land Claims is through with the case, under the principles enunciated by the Secretary of the Interior in the 'Tumacacori y Calabazas' claim. (*Supra*).

However desirable it might be to restore to the public domain some 100,000 acres of land, I am of opinion (after careful consideration of the matter) that to take the action recommended by you in this case would be premature.

You state that the case is not (or had not last October)

become final. The Land Department ought not, therefore, to interfere in the matter, *pendente lite*.

This office is not informed whether the grant claimants have filed in the court a motion for review of its decision in the premises, or taken the case on appeal to the U. S. Supreme Court, under the provisions of the act of March 3, 1891 (26 Stat. 854); or whether the time has expired within which the parties could exercise such right of appeal.

There is nothing before me going to show that the United States has not filed notice of appeal from the confirmatory decree of the court by direction of the Department of Justice.

In fact there is no evidence presented upon which this Bureau would be warranted in ordering the restoration of the lands in question at this time.

When the case shall have become *final*, by operation of law, or by stipulation between counsel for grantees and the U. S. Attorney, and instructions for surveying the claim in accordance with such final decree have been duly approved, and the application to restore a large portion of the lands now reserved in excess of the amount finally confirmed to be 'Canada de Cochiti' claimants (such lands as are, beyond doubt, not to be segregated in the survey under the decree), will be given due consideration by this Bureau."

As further showing that the Land Department has continuously held these private Spanish and Mexican claims to be in a state of reservation until their proper boundaries were fixed by some competent tribunal, see case of Joseph Farr, 24 L. D. 1; The Perrine Grant, 24 L. D. 109; The A. & P. R.R Co. *v.* Fisher, 1 L. D. 392, a case where the R.R Co. claimed the lands which fell within its granted limits but were within the limits of a Spanish claim, which, at the time the railroad grant was made was in process of litigation. In the decision in this case, Secretary Teller, alluding to the case of Wilcox *v.* Jackson, 13 Pet. 498, uses this language:

"The substantial fact in the case cited was that at the date when the railroad right became effective the land was claimed, in the proper tribunal, to be a part of a Mexican grant, and that that claim was *sub judice* pending the adjustment of the same. Now, if this be so, in such a case where the claim was found to be a forgery and absolutely rejected by reason of having no grant as a basis therefor, then, *a fortiori*, does the doctrine therein enunciated obtain in this case, where the grant is unquestionably valid, the same having been confirmed by Congress by express reference to certain original title papers of record in the office of the surveyor general of California, upon whom the duty of surveying the rancho in accordance with such papers was imposed, the issuance of patent for the lands thus surveyed being conditioned upon the approval of such survey by the Commissioner of the General Land Office."

In Whitaker *v.* S. P. R.R Co., 3 L. D. 459, it was declared that until the title to a floating grant vests in the grantees all the lands comprised within the claimed limits of the exterior boundaries thereof are held in reservation for the benefit of the grant.

These citations and quotations sufficiently show the practice of the Land Department and the reasons on which such practice is based. While it is true that some tracts of land lying within private grants have been patented to settlers and others, yet such sales were invariably inadvertences resulting largely from want of knowledge of the claimed boundaries. Congress recognized this, and in the act of 1891 *supra*, it provided that where the final decree disclosed that such sales had been made within the actual boundaries of the grant the outstanding patent should be considered as validated, and the owner of the private claim should be properly paid from the United States Treasury for his loss. Such sales and the remedial legislation concerning them only emphasize the understanding of both

Congress and the executive that the grantee of a Mexican grant is entitled under the treaty and laws to have his claim reserved until his title is finally fixed by decree.

It, then, seems perfectly clear that under the treaty with Mexico and the law of 1854, the Canada de Cochíti grant stood in reserve when the plaintiff and his associates took possession of the tract in question July 10, 1893, and remained in reserve when this suit was begun.

Let it be added to the reasons given above showing that this grant was reserved, the further reason that the title to the whole claim was in litigation on July 10, 1893, when plaintiff went into possession of the tract in question, and still remained in litigation when this suit was instituted and tried in the district court. The suit of the claimants to the grant was begun in the court of private land claims March 2 and 3, 1893, the decree of that court was rendered September 29, 1894, the case appealed to this court March 11, 1895, and decided here May 24, 1897. Even this latter decision was not final, as the lower court was directed to more clearly define one of the boundaries. We are not informed when this was done, but until it was done the Cochiti grant was in litigation.

Now, in Newhall *v.* Sanger, 92 U. S. 761, L. ed. Bk. 23: 769, the question seems to be well settled that while the title to claims of this character is in litigation for the purpose of settling the rights of the grantee, the whole area claimed is reserved from appropriation of any kind, and no part is "public lands" or "lands subject to sale."

Therefore, if we are right in this contention, the Supreme Court of New Mexico was in error in holding otherwise, and the trial court was in error in requiring the plaintiff to prove that he complied with the mining laws as to monuments, sinking of shaft, recording of notice, &c., as a requisite to his holding possession.

II.

Our second contention is that while the plaintiff was properly and peacefully in possession he was wrongfully ousted by the defendants as the result of a conspiracy and fraud, and we were denied the right of making proof of this before the jury.

Neither party could make a legal mining claim, the lands being in reserve. Kendall *v.* Mining Co., 144 U. S. 658, L. ed, Bk. 36: 583. Hence monuments, notice, discovery-shaft. &c., would avail nothing to the occupant when the reservation was withdrawn. All these would count for nothing towards establishing a legal lode claim. But if a party was found in actual possession when the reserve was terminated he could then perfect his claim by complying with the mining laws of the Territory and the United States, to the exclusion of all others. He would be held to be the discoverer of the lode or vein, and would then be allowed the statutory time to further comply with the law by posting notice, sinking shaft, &c. Hence the right of possession in this case was a valuable right.

And the owner of the true title, or the claimant to a title in litigation, not objecting, the courts regard the better right, as between the parties, to be vested in the first possessor. Bird *v.* Gibson, 70 Am. Dec. 617; Plume *v.* Seward, 60 *id.* 601; Weimer *v.* Lowry, 11 Cal. 104, and Bequette *v.* Canfield, 4 Cal. 278.

Neither does continuous *possessio pedis* apply to mines as to agricultural lands. Atwood *v.* Fricott, 17 Cal. 37; English *v.* Johnson, *id.* 107; Blanchard and Weeks on Mines, 107–172; Morton *v.* Solambo, 26 Cal. 527.

Then the prior discovery and possession by Pilkey of the mine was sufficient possession and title on the part of the plaintiff to sustain ejectment against the defendants as in-

truders thereon—they having no better title. Comp. Laws N. M. Secs. 1570, 2218, 2258, and 2263; Deemer *v.* Falkenberg, 4 Gildersleeve, 149; New Mexico, &c., *v.* Crouch, *id.* 293; Anderson *v.* Gray, 25 N. E. Rep. 843; Christy *v.* Scott, 14 How. 282; Corgell *v.* Cain, 16 Cal. 567; Wilson *v.* Fine, 38 Fed. Rep. 792.

And, of course, the possession of one tenant in common is the possession of his companions, and the law assumes and requires that each shall be true to the other. Mining Co. *v.* Taylor, 100 U. S. 37; Campbell *v.* Campbell, 13 N. H. 483; Kinney *v.* Slattery, 51 Ia. 353, and Miller *v.* Myers, 46 Cal. 535.

Therefore, putting Fagaly in possession, and denial by Pilkey of plaintiff's rights, would constitute an actual and fraudulent ouster of plaintiff. Sedgwick and Wait on Trial of Title to Land, p. 163, Sec. 277, and citations there given, and Barnitz *v.* Casey, 7 Cranch, 456.

With these points in mind, we then urge that the questions of conspiracy to defraud plaintiff of his property, and of his alleged abandonment of his property, were each questions of fact for the jury exclusively, under proper instructions from the court. Russell *v.* Post, 11 Sup. Ct. (N. M.) 353; Preston *v.* Bowers, 13 Ohio St. 13; Comrs. *v.* Brown, 14 Gray, 419; Richardson *v.* McNulty, 24 Cal. 339; Taylor *v.* Middleton, 67 Cal. 656; Myers *v.* Spooner, 55 Cal. 257; Avery *v.* Clemons, 18 Conn. 306, and Mallett *v.* Uncle Sam Co., 1 Nev. 194, *id.* 215. Also see Hammer *v.* Garfield Co. 130 U. S. 291, L. ed. Bk. 32: 964, as to what constitutes possession and forfeiture and abandonment of mine claims made on the public lands.

Now, upon the trial of the case in the district court, before the jury, the plaintiff offered to show that while he and his associates, Ben. Johnson and Pilkey, went into possession of the premises on the 10th of July, 1893, the conspiracy between Pilkey and some of the other defendants was concocted as early as September following, and possession actu-

ally taken by Fagaly, on behalf of his co-conspirators, Pilkey, Walker, Leeds, and J. Johnson, during that month. The judge refused to allow any evidence tending to show fraud on the part of the defendants to go to the jury. He did this on the theory that the ground in dispute was public lands subject to appropriation for mining purposes, and that plaintiff had not complied with the law requiring eight monuments to be placed about the claim to mark its boundaries, a shaft to be sunk on the lode 10 feet deep, and the notice to be recorded, all within three months after notice of discovery, holding that the three months having expired before these things were done, and the notice of the defendants having been posted after the expiration of such three months, was conclusive evidence of abandonment on the part of plaintiff and legitimate entry by the defendants. In a word, the trial court held hard to a theory that the land in question was subject to the provisions of section 2319 of the Revised Statutes of the United States and the mining laws of New Mexico, and hence the discoverer of a lode could only maintain possession by putting up monuments, &c., within three months, and failure to do these things was abandonment.

Upon this theory he refused all evidence tending to show that while plaintiff was depending upon his co-tenant, Pilkey, to hold and keep possession, the defendants named above had conspired with him to defraud the plaintiff, and had actually taken possession even before the said three months had expired.

Now it is held in Gregg *v.* Sayre, 8 Pet. 244, L. ed. Bk. 8: 932, that it is an admitted principle that a court of law has concurrent jurisdiction with a court of chancery in cases of fraud. And in Clements *v.* Nicholson, 73 U. S. 299, L. ed. Bk. 18: 786, that "where the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity."

Justice Story, in delivering the opinion in United States *v.* Amistad, 15 Pet. 518, L. ed. Bk. 10: 826, declared that: "Fraud will vitiate any, even the most solemn transactions, and any asserted title to property, founded upon it, is utterly void." In League *v.* Young, 11 How. 185, L. ed. Bk. 13: 657, this language is used: "Judgments as well as grants obtained by fraud or collusion are void, and confer no vested title."

In Lincoln *v.* Claflin, 74 U. S. 132, L. ed. Bk. 19: 106, opinion by Justice Field, the following, in substance, was held:

This was a case brought to recover damages for fraudulently obtaining property. The declaration alleges a combination between the defendants pursuant to which one of them purchased a large amount of goods upon a false and fraudulent statement of his means in business, and the other defendant disposed of them within a few days afterward at less than cost, the whole proceeding being taken with intent to fraud the vendors. The case proceeds upon the theory that the title to the goods never passed to the defendants, but remained in the plaintiffs, from whom they were fraudulently obtained. In the trial of the case the court held that it was sufficient to show that the defendant who received and sold the goods, with knowledge of fraud, became a party to it; that subsequent participation in the fraud was as effective to charge him, as pre-concert and combination in its execution. This court holds that in this position the court below was not in error. The opinion adding: "If, knowing the fraud contrived, he aided in its execution, and shared in its proceeds, he was chargeable, for all its consequences, and could be treated and pursued as an original party."

Plaintiff in error therefore insists that the premises in question not being subject to the mining laws there could be no question of abandonment because the plaintiff had not complied with the said laws. Hence the whole question of fraud as tendered on the trial should have been submitted to

the jury. But even if the premises had been located on public lands, the offer to show that in pursuance of the fraudulent agreement the conspirators went into possession of the mine as early as September (a considerable time before the statutory three months had expired), the evidence should have been admitted.

In New Mexico the rule is established beyond controversy that "it is error to withdraw from the jury the determination of a disputed fact in issue. Where there is a substantial conflict of testimony, it is for the jury and not for the court to decide."

Lockhart *v.* Wills (N. M.), 1897, 50 Pac. Rep. 318—and cases cited; Chaves *v.* Chaves, 3 N. M. 306. In Montclair *v.* Dana, 107 U. S. 162, L. ed. Bk. 27: 436, this court said: "The jury may be controlled in their determination of a question by a peremptory instruction, if the testimony is of such a conclusive character as would compel the court, in the exercise of a sound discretion, to set aside a verdict if one were returned in opposition to such testimony." Also see Ins. Co. *v.* Doster, 106 U. S. 32, L. ed. Bk. 27: 65.

In this case there was much conflict in the testimony that was admitted as to possession and abandonment, and hence the case should not have been taken from the jury, as shown by the cases cited. But in addition to this, we urge that the statements made by Pilkey, Fagaly and Walker, respectively, while in possession, or conspiring to get into possession, of the premises, were admissible in evidence for various reasons—as declarations against interest, as showing the character of defendant's title, as declarations of conspirators made during the pendency of a fraudulent combination. In addition to citations already given touching more or less on this point, we call attention to the following: 2 Wharton on Evidence, Sec. 1156, 1 Greenleaf, on Evidence, 109; Rowland *v.* Philadelphia, 28 At. Rep. 102, Ward *v.* Cochrane, 71 Fed. Rep. 135, and Martin *v.* Bonsack, 61 Mo. 559.

We therefore insist that the District Court erred in refusing to admit the testimony of Fergusson and others showing, or tending to show, a conspiracy of the defendants, or some of them to defraud; also erred in taking the case from the jury; and that the Supreme Court of the Territory erred in deciding that the Canada de Cochiti grant, covering the premises in question, was not reserved at the time the plaintiff took possession, and not reserved from that date up to and at the time the suit was begun.

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